UNITED ASIAN BANK BHD.

v.

TAI SOON HENG CONSTRUCTION SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TAN SIR DATO' HARUN M. HASHIM SCJ, DATO' ANUAR BIN DATO' ZAINAL ABIDIN J., DATUK L.C. VOHRAH J.
[CIVIL APPEAL NO. 02-243 OF 1991]
31 DECEMBER 1992

TORT: Conversion - Payment by appellant bank on cheques drawn on the account of respondent - Signatures on cheques - Whether forgeries - Expert concluding cheques were forgeries - Whether reasons should be given - Whether in fact given - Whether question of forgery determined by trial judge - Standard of proof - Whether beyond reasonable doubt or balance of probabilities; liability of appellant - Tort of conversion - Strict liability at common law - Bills of Exchange Act 1949 - Exception to common law - Representation by customer of validity of signature - Estoppel - Whether applicable to respondent - Whether respondent precluded from contending forgery - Whether respondent under duty to prevent forgery - Quantum - Whether interest awarded by trial judge proper - Whether constituted double accounting.

BANKING: Payments by appellant bank on forged cheques - Principles governing liability of bankers - Common law liability - Liability under Bills of Exchange Act 1949.

EVIDENCE: Expert evidence - Conclusions drawn by expert - Whether reasons should be given - Whether evidence in fact supported by data; Forgery in cases of cheques - Standard of proof.

The appellant carried on banking business. The respondent was a customer of the bank, having an account at the branch of the bank at Jalan Ipoh. Two of the respondent's directors were the authorised signatories to operate the account. One Wong Chow Seng ('Wong'), the respondent's accounts clerk, forged several cheques of the respondent drawn on the appellant. The cheques were honoured by the appellant and the respondent's account with it was debited in consequence. The fraud was discovered when a new accounts clerk was employed. Police reports were lodged. A total of 97 cheques had been forged, all of which had been honoured by the appellant. Wong was charged under s. 420 of the Penal Code in respect of 18 of the cheques and convicted and sentenced.

The respondent issued a writ claiming a sum of RM397,660 being the total of the 97 forged cheques that had been met by the appellant. In the main, the claim was on the tort of conversion. The trial Judge found the cheques to have been forged, and applying the decision of the Privy Council in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. & Ors.* gave judgment for the respondent in the sum of RM1,491,424.34 together with interest on the sum of RM397,660 at the rate of 8% per annum from 25 August 1983 to the date of realisation. The appellant appealed.

Held:

A. *Liability*

[1] *Question of fact of forgery*

(a) In holding that the cheques were forgeries, the trial Judge had not abdicated his function by allowing the expert to determine the question, which is a question of fact, as to whether the signatures were forgeries.

(b) The respondent had in the expert's evidence-in-chief adduced sufficient evidence that supported the expert's conclusion on the question of whether the cheques were forged. In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would constitute a serious misdirection warranting interference by an appellate tribunal. However, this principle had no application to the facts of this case.

(c) The standard of proof required in a case of forgery on the facts of such a case as the one before the Court is not that of beyond reasonable doubt, but of a balance of probabilities.

[2] *Principles governing liability of the appellant.*

(a) The appellant, as a banker, was absolutely liable. On the other hand,

the respondent was not under any duty to ensure that its cheques were not forged by its employee, and therefore there could not be an estoppel operating against it.

(b) At common law, the liability of a banker is founded on the tort of conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act on it.

(c) Section 24 of the Bills of Exchange Act 1949, which codifies the common law, creates a limited exception in favour of a banker. Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

(d) At common law, a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. There does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

(e) The decision of the Privy Council in *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd.* should be followed. In that case it was held that there was no basis for the 'wider duty' or the 'narrower duty' as either an implied term of the contract between banker and customer or as a duty of care in tort, and that in the absence of any duty there could not be an estoppel. It is important generally, and more so in matters of commercial law, that there should be uniformity in the common law of the Commonwealth. This is good judicial policy and provides for consistency.

B. *Quantum*

There was no merit in the complaints made in respect of quantum awarded by the trial Judge. The appellant was obliged to reimburse the respondent with interest at the same rate as that imposed on the respondent's overdraft account. Strictly speaking, the Judge was not making any special award in the nature of damages when he awarded interest and there was therefore no question of double accounting. It was merely a case of an adjustment of the accounts.

[*Appeal dismissed with costs to be taxed].*

Bahasa Malaysia Translation of Headnote

TORT: Konversi - Pembayaran oleh perayu bank pada cek-cek yang dikeluarkan atas akaun responden - Tandatangan pada cek-cek - Sama ada palsu - Pakar merumuskan cek-cek adalah palsu - Sama ada alasan-alasan harus diberikan - Sama ada sebenarnya telah diberikan - Sama ada persoalan pemalsuan ditentukan oleh hakim perbicaraan - Standard kebuktian - Sama ada di luar keraguan munasabah atau imbangan kemungkinan; liabiliti perayu - Tort konversi - Liabiliti ketat mengikut common law - Akta Bil Pertukaran 1949 - Pengecualian kepada common law - Representasi oleh pelanggan akan pengesahan tandatangan - Estopel - Sama ada terpakai kepada responden - Sama ada responden dihalang daripada mendebatkan pemalsuan - Sama ada responden berada di bawah kewajipan untuk menghalang pemalsuan - Kuantum - Sama ada faedah yang diawadkan oleh hakim perbicaraan wajar - Sama ada terdiri daripada penggandaan perakaunan.

URUSAN BANK: Pembayaran oleh perayu bank pada cek-cek palsu - Prinsip-prinsip yang mengawasi liabiliti jurubank - Liabiliti Common Law - Liabiliti dibawah Akta Bil Pertukaran 1949.

KETERANGAN: Keterangan pakar - Rumusan yang diambil oleh pakar - Sama ada alasan-alasan harus diberikan - Sama ada keterangan sebenarnya disokong oleh data; Pemalsuan dalam kes-kes cek - Standard kebuktian.

Perayu menjalankan urusniaga bank. Responden adalah merupakan seorang pelanggan bank tersebut, mempunyai suatu akaun dicawangan bank tersebut di Jalan Ipoh. Dua orang dari pengarah responden adalah merupakan penandatangan yang dibenarkan bagi menjalankan akaun tersebut. Seorang bernama Wong Chow Seng ("Wong") kerani akaun responden, telah memalsukan beberapa keping cek responden yang dikeluarkan atas nama perayu. Cek-cek tersebut telah dilunaskan oleh perayu dan hasilnya akaun responden dengan perayu telah didebitkan. Penipuan tersebut diketahui apabila seorang kerani akaun baru diambil bekerja. Aduan polis telah dibuat. Sejumlah 97 keping cek telah dipalsukan, yang mana kesemuanya telah dilunaskan oleh perayu.Wong telah dihadap tuduh dibawah s. 420 Kanun Keseksaan berhubung dengan 18 keping cek tersebut dan beliau telah disabitkan kesalahan dan dijatuhkan hukuman.

Responden mengeluarkan satu writ menuntut wang berjumlah RM397,660 yang merupakan jumlah 97 keping cek yang telah dipalsukan itu dan dilunaskan oleh perayu. Secara utamanya, tuntutan tersebut adalah pada tort konversi. Hakim perbicaraan mendapati bahawa cek-cek tersebut telah dipalsukan dan dengan memakai keputusan Majlis Privy dalam *Tai Hing Cotton Mill Ltd. lwn. Liu Chong Hing Bank Ltd. & Ors.* memberikan penghakiman bagi responden dalam wang berjumlah RM 1,491,424.34 bersama-sama dengan faedah ke atas wang berjumlah RM397,660 pada kadar 8% setahun dari 25 Ogos 1983 sehingga tarikh pembayaran. Perayu telah merayu.

Diputuskan:

A. Liabiliti

[1] ***Persoalan Fakta Pemalsuan***

(a) Dalam memutuskan bahawa cek-cek tersebut adalah palsu, Hakim perbicaraan telah tidak melepaskan fungsinya dengan membenarkan pakar untuk menentukan persoalan tersebut, yang mana adalah merupakan suatu persoalan fakta, berhubung dengan sama ada tandatangan-tandatangan tersebut palsu.

(b) Responden telah dalam keterangan utama pakar mengemukakan keterangan yang secukupnya yang menyokong rumusan atas persoalan sama ada cek-cek tersebut telah dipalsukan. Dalam sesuatu kes sivil dan lebih-lebih lagi dalam kes jenayah, keterangan pakar mengenai tulisan tangan yang tidak disokong oleh data yang meyakinkan yang menunjukkan melalui proses manakah beliau membuat rumusannya adalah tidak bernilai di atas kertas mana ianya ditulis dan sebarang pergantungan keatas keterangan sedemikian akan menghasilkan sesuatu kekeliruan di mana ini akan membawa kepada campur tangan tribunal rayuan. Walau bagaimanapun, prinsip ini tidak mempunyai sebarang pemakaian kepada fakta-fakta kes ini.

(c) Standard kebuktian yang dikehendaki dalam sesuatu kes pemalsuan atas fakta-fakta kes yang sedemikian seperti yang berada di hadapan Mahkamah ini bukanlah sesuatu yang di luar keraguan munasabah, tetapi suatu imbangan kemungkinan.

[2] ***Prinsip-prinsip yang mengawasi liabiliti perayu.***

Perayu selaku jurubank adalah bertanggungjawab sepenuhnya. Sebaliknya, responden tidak berada dibawah apa-apa kewajipan untuk memastikan bahawa cek-ceknya tidak dipalsukan oleh pekerjanya, dan oleh yang demikian tidak boleh terdapat estopel burfungsi terhadapnya.

Mengikut common law, liabiliti jurubank ditemui atas tort salah guna, yang mana merupakan tort liabiliti ketat. Jurubank yang memberikan pembayaran atas sesuatu suratcara yang dipalsukan dan dikeluarkan atas akaun pelanggannya adalah bertanggungjawab sepenuhnya bagi mengganti rugi ke atas kehilangan tersebut.Suratcara tersebut adalah tidak sah dan jurubank tidak mempunyai sebarang kuasa, aktual atau tersirat, daripada pelanggannya untuk bertindak ke atasnya itu.

Seksyen 21 Akta Bil Pertukaran 1949, yang mengkanunkan common law, mewujudkan

suatu pengecualian yang terhad memihak kepada jurubank. Seksyen 24 melindungi jurubank dengan menggunakan doktrin estopel. Seseorang pelanggan tidak boleh mendapatkan semula wangnya sekiranya dia telah merepresentasikan kepada jurubanknya bahawa tandatangan tersebut adalah berkesan dan suratcara tersebut adalah dengan itu teratur untuk pembayaran.

Mengikut common law, seseorang pelanggan berhutang kepada jurubanknya hanya dua kewajipan. Yang pertama sekali ialah menghindarkan diri daripada mengeluarkan cek dalam cara yang sedemikian rupa yang mana boleh memudahkan penipuan atau pemalsuan. Yang kedua ialah kewajipan untuk memaklumkan kepada bank mengenai sesuatu pemalsuan cek yang kononnya dikeluarkan atas akaun sebaik sahaja pelanggan tersebut sedar mengenainya. Tidak wujud, mengikut common law, suatu kewajipan yang selanjutnya dipihak pelanggan untuk mengambil langkah berjaga-jaga dalam urusan biasa urusniaganya bagi mengelakkan pemalsuan oleh pekerjanya. Begitu juga, mengikut common law, dalam ketiadaan sesuatu kontrak yang bertentangan, tidak terdapat kewajipan yang dikenakan ke atas pelanggan bagi memeriksa penyata berkalanya bagi memastikan bahawa akaunnya dikendalikan dengan baiknya oleh bank berkenaan.

Keputusan Majlis Privy dalam *Tai Hing Cotton Mill lwn. Liu Chong Hing Bank Ltd.* haruslah diikuti. Dalam kes tersebut telah diputuskan bahawa tidak ada sebarang asas bagi "kewajipan yang lebih luas" atau "kewajipan yang lebih kecil"sebagai suatu terma tersirat dalam kontrak diantara jurubank dan pelanggan ataupun sebagai kewajipan berjaga-jaga dalam tort, dan bahawa dalam ketiadaan apa-apa kewajipan, tidak boleh terdapat estopel. Adalah penting pada amnya, dan lebih-lebih lagi dalam perkara-perkara undang-undang perdagangan, bahawa harus terdapat keseragaman dalam common law Komanwel. Ini adalah polisi kehakiman yang baik dan mewujudkan kekonsistenan.

B. Kuantum

Tiada sebarang merit dalam aduan yang dibuat berhubung dengan kuantum yang diawadkan oleh Hakim perbicaraan. Perayu wajib mengganti bayar kepada responden dengan faedah pada kadar yang sama yang dikenakan ke atas akaun overdraf responden. Tegasnya, Hakim berkenaan tidak membuat apa-apa awad khas dalam bentuk ganti rugi apabila beliau mengawadkan faedah dan oleh yang demikian tidak ada sebarang persoalan mengenai penggandaan akaun. Ia hanya merupakan suatu kes pelarasan akaun semata-mata.

[Rayuan ditolak dengan kos untuk ditaksirkan].

Cases referred to:

Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. & Ors. [1985] 3 WLR 317 ***(foll)***

Syarikat Perkapalan Timor v. United Malayan Banking Corpn. Bhd. [1982] 2 MLJ 193 ***(refd)***

Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd. [1988] 3 MLJ 218 ***(foll)***

Marfani & Co., Ltd. v. Midland Bank, Ltd. [1968] 2 All ER 573 at 577 ***(refd)***

Brown v. Westminister Bank, Ltd. [1964] 2 Ll.R 187 ***(refd)***

Tina Motors Pty. Ltd. v. Australia & New Zealand Banking Group Ltd. [1977] VR 205 ***(refd)***

London Joint Stock Bank Ltd. v. Macmillan [1918] AC 777 ***(foll)***

Greenwood v. Martins Bank Ltd. [1933] AC 51 ***(foll)***

Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty. Ltd. & Anor. [1981] 148 CLR 304 ***(refd)***

National Bank of New Zealand Ltd. v. Walpole and Patterson Ltd. [1975] 2 NZLR 7 ***(refd)***

Abu Chettiar v. Hyderabad State Bank [1954] 1 Madras Law Journal 566 ***(refd)***

Canadian Pacific Hotels Ltd. v. Bank of Montreal [1988] 40 DLR 4th 385 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, s. 24

Penal Code, s. 420

Bills of Exchange Act 1882 (UK)

Other sources referred to:

The Identification of Handwriting and the Cross-examination of Experts, M.K. Mehta, p. 23

For the appellant - Joginder Singh; M/s. Joginder Singh

For the respondent - G. Sri Ram (Manjit Singh with him); M/s. Sri Ram & Co.

JUDGMENT

Anuar Bin Dato' Zainal Abidin J:

This is an appeal by United Asian Bank Bhd. (which, since the lodging of the appeal, has changed its name to Bank of Commerce Bhd,) against the decision of Zakaria Yatim J., given at Kuala Lumpur on 4 June 1991 whereby the learned Judge entered judgment against the appellant in the sum of RM1,491,424.34 together with interest on the sum of RM397,660 at the rate of 8% per annum from 25 August 1983 until the date of realisation. On 13 October 1992 after hearing arguments we dismissed the appeal with costs. We had at the time indicated that we would give written reasons for our decision and we accordingly do so now.

The facts of this case are fairly simple and straightforward. The appellant carries on banking business. It has a branch at Jalan Ipoh, Kuala Lumpur. The respondent was a customer of the appellant having an account at the said branch. The respondent's account No. 20-090 with the appellant was opened on 25 January 1978, by means of a document intituled "Account Opening Form". A directors' circular resolution dated 16 January 1978, accompanied the respondent's application to open the account and in it any 2 of the respondent's 3 directors were nominated as the authorised signatories to operate the account. The form by which the account was opened is, by reason of the way in which the case has been argued by the appellant, important and merits full reproduction. It is in these terms:

Account Opening Form

[Limited Companies]

25 January 1978

Account No. 20-090

The Manager,

United Asian Bank Berhad
Jalan Ipoh

Sir,

We request you to open a Current Deposit Account in our name in the books of the Bank.

We hand you herewith:-

(1) Certificate of Incorporation (for inspection and return).
(2) Copy of Memorandum and Articles of Association.
(3) Certificate of the Registrar of Joint Stock Companies that the Company is entitled to commence business (for inspection and return).
(4) Certified Copy of a Resolution of the Board of Directors regulating the conduct of the account, together with specimens of the signature of the authorised signatories (Please see reverse of this form).

or

Power of Attorney containing authority to open Banking Account and to operate thereon together with specimen of signature.

We agree to comply with, and to be bound by, the Bank's rules for the time being for the conduct of such accounts.

Kindly furnish us with a Pass Book and a book of cheque forms.

Title of Account Tai Soon Heng Construction Sdn. Bhd.

Address No. 18 Jalan Suppiah Pillay, Sentul, K.L.

Yours faithfully,
Sgd Tai Soon Heng Construction Sdn. Bhd.
.....
Director

(Emphasis added)

It is pertinent to note that the bank's rules referred to in the form were never produced in evidence. Nor was evidence given as to the existence of such rules.

At all material times, one Wong Chow Seng ("Wong") was the respondent's accounts clerk. Between November 1979 and November 1982 Wong cleverly forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. Wong was not an authorised signatory to negotiable instruments, including cheques, drawn by the respondent on the appellant.

In August 1982 the respondent employed a new accounts clerk who, in December of that year, discovered the fraud perpetrated by Wong. Consequently on 9 December 1982, the respondent's Managing Director, Yong Kai Meng (PW4 in the court below), lodged a police report (Exhibit P4) complaining of the forgeries that had been discovered as at that

date. Further forgeries were later discovered and PW4 lodged another report on 14 April 1983. It transpired that a total of 97 cheques had been forged by the fraudulent Wong, all of which had been honoured by the appellant. Wong was later charged under s. 420 of the Penal Code in respect of 18 cheques. He pleaded guilty and was accordingly convicted and sentenced.

On 5 August 1983 the respondent issued Writ against the appellant claiming a sum of RM397,660 being the total of the 97 forged cheques that had been met by the appellant. In the main, the respondent's case against the appellant, although it included a charge of negligence, was based on the tort of conversion. The appellant raised several defences all of which were rejected by the learned Judge who found in the respondent's favour and accordingly entered judgment. The learned Judge in rejecting the factual defence found that the impugned cheques had indeed been forged. In rejecting the legal defences, he relied almost entirely on the decision of the Privy Council in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd & Ors.* [1985] 3 WLR 317.

Before us, Mr. Joginder Singh, who also appeared as Counsel for the appellant in the court below, sought to attack the learned Judge's conclusions both on the facts and the sustainability of the legal defences raised by the bank in answer to the respondent's claim. It is therefore necessary to deal with the several issues which appellant's Counsel has raised and argued.

In its defence, the appellant specifically denied that the signatures on the impugned cheques had been forged. The respondent therefore set about proving forgery. In support of its case, it called Mr. Phan Kok Chai, the Document Examiner from the Department of Chemistry who gave expert evidence that in his opinion the 97 cheques did not bear the authorised signature. On some of these cheques the signatures of both authorised signatories had been forged; in others, one of them had been forged. PW4 also testified on the issue of forgery and denied having signed the relevant cheques. The learned Judge in his very careful judgment gave cogent reasons for holding that the cheques were forgeries.

The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial Court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial Judge is not entitled to abdicate his function by allowing the expert to determine the question. In this case, we are satisfied that the learned trial Judge has not fallen into an error of this nature.

Mr. Joginder Singh has attacked Mr. Phan's evidence on the ground that he did not give reasons for coming to his conclusion that the signatures on each of the 97 cheques had been forged and in support of his submission relied on a passage in the text book "The Identification of Handwriting and the Cross-examination of Experts" by M.K. Mehta where the learned author states (at p. 23 of the text):

> It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions while submitting the reports to the courts. The result is that the courts as well as the lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the correctness of the opinions given. The mere opinion of the expert that a particular writing or signature is written or not written by the writer whose standard admitted writings or signatures were supplied to him for comparison, without any cogent reason, is not enough. The function of the expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because it is the court who has to decide the case and accept or reject his opinion. In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross-examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence.

We entirely agree with the passage cited. In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate

tribunal. However, having said that, we are of the opinion that the principle contended for has no application to the facts of this case.

In the first place, the disputed cheques were referred to Mr. Phan pursuant to two Orders of Court dated 23 July 1987 and 28 October 1987 (produced in the Court below as Exhibits P29 and P30) which required him to examine the cheques and say whether the signatures upon them were genuine or not. This he did. Secondly, having examined the Record of Appeal, we are satisfied that the respondent had in Mr. Phan's evidence-in-chief adduced sufficient evidence to support his conclusions. That being the case, it was up to the appellant to challenge the evidence of Mr. Phan under cross-examination by attacking the reasons for his conclusions. From the record it is apparent that Mr. Phan was subjected to searching and strenuous cross-examination. The learned Judge nevertheless accepted his evidence and we are unable to find any misdirection by the learned Judge on this point.

Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the Court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v. United Malayan Banking Corporation Berhad* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with appellant's Counsel that it is authority for the proposition that is put forward for the appellant. In our judgment a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect we agree with the statement of the law by Gunn Chit Tuan J. (as he then was) in *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd.* [1988] 3 MLJ 218 where at p. 220 the learned Judge said:

> In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.

We are therefore of opinion that the learned Judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

For the reasons we have given, we are in agreement with the learned Judge upon his conclusion on the issue of forgery. There has been no misdirection on his part and we accordingly uphold his findings on the point.

The important point of principle upon which this appeal turns is the liability of a banker to his customer in respect of forged cheques. Mr. Joginder Singh has argued that although the cheques were forged the appellant was nevertheless not liable for the following reasons:

1. The Respondent was under a duty to ensure that its cheques were not forged by its employee and it had acted in breach of this duty on the facts of the case. At the very least, the respondent was guilty of contributory negligence in not supervising the employee sufficiently, for had it done so, the forgeries would not have occurred or at least would have been detected much earlier;
2. The respondent was estopped from claiming that the bank was liable because the bank had sent periodic statements of account which carried a notation to the effect that unless the appellant was notified of any discrepancy within 14 days the balances shown in the statements will be considered correct. Further, the bank had also sent confirmation slips which the respondent had acknowledged as accurately reflecting its bank balance and in the premises, it was not open for the respondent to challenge the debits made against the forged cheques. In any event, these matters constituted an implied term in the contract between the appellant and the respondent.

In making these submissions, Mr. Joginder Singh made a frontal attack on the Privy Council decision in *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd.* [1985] 3 WLR 317. In that case, the Privy Council had put paid to the arguments now canvassed before us and also advanced by the appellant in the Court

below. Counsel submits that we should depart from *Tai Hing* and hold the bank safe from liability. The submissions made in support of the appellant's case are far reaching and the case has therefore become one of general importance. Before, however, we deal with *Tai Hing* and determine what exactly it decided, it is necessary for us to examine the principles on which a banker's liability to his customer depends when the former meets forged cheques drawn on the account of the latter.

It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability. At common law, the business of a banker was so perilous because of the nature of the tort of conversion that in 1882 it became necessary in England to introduce legislation to safeguard the banking community. The Bills of Exchange Act 1882 of U.K. finds its parallel in the enactment of the same name in this country passed in 1949. The history of the matter has been well traced in a judgment of Diplock LJ (as he then was) in *Marfani & Co., Ltd. v. Midland Bank, Ltd.* [1968] 2 All ER 573 at 577 where the following statement of the law appears:

> It may seem odd that in the 1960s (and we may add in the 1990s) the liability of the defendant bank for the part which they were deceived into playing in this transaction should be affected by the series of legal fictions by use of which the lawyers of the sixteenth century evolved from the ancient real action of detinue sur trover a personal action on the case of trover which, with the abolition of forms of action, became the modern tort of conversion. It may also seem odd that the basis of their liability is that the piece of paper on which the cheque was written was "goods" belonging to the plaintiff company, and that the defendant bank's acts in accepting possession of that piece of paper from Kureshy, in presenting it to the Bank of India and accepting payment of it, constituted an unjustifiable denial by them of the plaintiff company's title to its goods, from which damage flowed. Such, however, is the common law of England, and one of the consequences of the historic origin of the tort of conversion and its application to negotiable instruments as "goods" is that the tort at common law is one of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.
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> At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.
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> A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.
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> So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s. 82 of the Bills of Exchange Act, 1882, then by the Bills of Exchange (Crossed Cheques) Act, 1906, and finally by s. 4 of the Cheques Act 1957.

Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker. The section provides:

24. Subject to the provisions of the Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

The proviso has no application to the facts of the case before us.

Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment. There are several decisions illustrating the circumstances in which a banker is protected but for the purposes of this appeal it is sufficient to refer to just two of these.

In *Brown v. Westminster Bank, Ltd.* [1964] 2 LL.R. 187, the plaintiff's signature had been forged by a Mrs. Carless, her husband and her daughter on some 329 cheques that had been stolen from the plaintiff. One hundred of these cheques had been forged between February 1959 and April 1961. The remainder were forged between April 1961 and October 1961. Evidence was led to show that the bank's branch manager had, in October 1960, drawn the plaintiff's attention to a number of cheques that had been apparently made payable to Mr. Carless. At an interview which the branch manager had with the plaintiff, the former was given the impression by the latter that the cheques were genuine. At a second interview, the plaintiff had been specifically asked by the branch manager to check her statements of account. The plaintiff failed in her action to recover the monies paid out on the forgeries. It was held that there was an estoppel in favour of the bank in that by failing to respond to the inquiries made by the bank's branch manager, the plaintiff by her silence had represented the cheques to be genuine and was therefore precluded from contending otherwise. On the facts of that case, the plaintiff was plainly under a duty to speak and her silence therefore amounted to an estoppel.

In *Tina Motors Pty. Ltd. v. Australia & New Zealand Banking Group Ltd.* [1977] V.R. 205, the plaintiff's employee had forged a number of cheques drawn on the plaintiff's account with the defendant. The bank paid the cheques and then debited the plaintiff's account. On two occasions the bank had doubted the signatures on cheques presented by the employee and before paying the cheques the manager of the bank's branch had telephoned a director of the plaintiff who told the manager that if the employee was presenting a cheque the signature was in order. The manager accordingly gave instructions that the cheques presented by the employee should be honoured. The plaintiff later brought an action for a declaration that the bank had improperly debited its account. The action failed on the ground that the plaintiff was estopped from claiming that the cheques had been forged. The bank had relied upon the oral representations made by the director that the signature on any cheques presented by the employee for payment was in order and the bank had acted to its detriment by paying the cheques. The duties owed to each other by a banker and his customer were considered by Crockett J., in these terms:

> That mutual duties of care are owed by banker and customer is beyond question. The duty is a continuing one to act with reasonable care to ensure the proper working of the account. The duty of the bank is to know the customer's signature and to pay without delay upon the authority created by the cheque and in conformity with the mandate constituted by the directions found in the cheque. But payments may be delayed for a reasonable time to permit a reference to the drawer. The customer must use reasonable care in drawing the cheque so that the bank will not be misled. However, in ordinary circumstances, compliance with his duty does not require the customer to contemplate the possibility of either an authorization or mandate being forged. **He is thus under no duty to exercise reasonable care in the general course of carrying on business to prevent forgery on the part of an employee.** On the other hand, the duty of the bank would require it to report to the customer any rejection by it of a cheque as being forged, so as to enable the customer to enquire into, and protect himself against, the

circumstances of the supposed forgery. Should such a report be communicated so that the customer became aware that forged cheques were being presented to his banker, discharge of his duty of care would demand his informing the banker of that fact. The corollary of this proposition is that silence in the face of a duty to speak may give rise to an estoppel. These propositions emerge from a consideration of such cases as *Colonial Bank of Australasia Ltd. v. Marshall* [1906] AC 559; *London Joint Stock Bank Ltd. v. Macmillan, supra* (in so far as the opinions of the House of Lords therein expressed are not in conflict with the advice of the Privy Council in *Marshall's* case) *Greenwood v. Martins Bank Ltd.*, [1932] 1 KB 371 (CA), esp. per Scrutton, LJ and [1933] AC 51 (HL); *Brown v. Westminster Bank Ltd.*, [1964] 2 Lloyd's Rep. 187; *Varker v. The Commercial Banking Co. of Sydney Ltd.*, [1972] 2 NSWLR 967 and *National Bank of New Zealand Ltd. v. Walpole & Patterson Ltd.*, [1975] 2 NZLR 7.

By the doctrine of estoppel a person is precluded from denying the truth of the representation acted upon for any purpose which results in a detriment to the representee. It was contended for the plaintiffs, should Hardy's version be accepted, that upon the true construction of that version the defendant could not be shown to have acted upon such representation as was made. If it did, then that it did so to its detriment is undeniable.

(Emphasis supplied)

A consideration of the relevant authorities shows that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan* [1918] AC 777 ("the MacMillan duty"). The second was laid down by the decision in *Greenwood v. Martins Bank Ltd.* [1933] AC 51 ('the Greenwood duty").

The MacMillan and Greenwood duties have been recognised and applied in Australia *(Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty. Ltd. & Anor* [1981] 148 CLR 304), in New Zealand *(National Bank of New Zealand Ltd v. Walpole and Patterson Ltd.* [1975] 2 NZLR 7), in India (*Abbu Chettiar v. Hyderabad State Bank* [1954] 1 Madras Law Journal 566) and in Canada (*Canadian Pacific Hotels Ltd. v. Bank of Montreal* [1988] 40 DLR 4th 385). The decision in *MacMillan* has been applied in Malaysia: see *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd. (supra).*

After a careful examination of the decisions of the superior Courts of the Commonwealth, we are satisfied that there does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

In *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. (supra),* an accounts clerk of a textile company forged the signature of the company's managing director on some three hundred cheques totalling approximately HK$5.5 million. The forgeries extended over a period of about $3^1/_2$ years and were not discovered because of inadequate internal controls. The company brought an action for a declaration that the three banks involved were not entitled to debit its accounts for the payment of the forged cheques. The banks contended that the company was precluded from setting up the forgeries by the breach of a duty of care owing to the banks. The banks relied on what was referred to as the "wider duty", that is, a duty to take such precautions as a reasonable customer in his position would take to prevent forged cheques being presented to his bank for payment. They also relied on what was referred to as the "narrower duty", that is, a duty to take such steps to check his monthly bank statements as a reasonable customer in his position would take to enable him to notify the bank of any items debited therefrom which were not or may not have been authorised by him. Reliance was also placed on the customer's agreement at the time the accounts were opened to comply with the bank's rules and procedures governing the conduct of the accounts. In each case there was a rule to the general effect that upon failure to notify the bank within a specified period of any error in the bank statements,

which was sent to the customer without return of the cancelled cheques, the statement would be deemed to be approved or confirmed. We would observe that the facts of *Tai Hing* were much stronger in favour of the banks there than those in the case before us.

The Privy Council held that there was no basis for the "wider duty" or the "narrower duty" as either an implied term of the contract between banker and customer or as a duty of care in tort, and that in the absence of any duty there could not be an estoppel. It is of interest to note that Lord Roskill who was the trial Judge in *Brown v. Westminster Bank (supra)* was a member of the Board that heard the appeal in *Tai Hing.*

As we have earlier observed, Mr. Joginder Singh invited us not to follow the decision of the Privy Council in *Tai Hing.* Mr. Sri Ram who appeared for the respondent gave three reasons as to why we ought not to do so. First, he said, the Privy Council in *Tai Hing* did not lay down any new principle but merely restated principles that had been established by previous authority. His second reason is that a departure from *Tai Hing* would put Malaysian common law out of line with the common law of the Commonwealth on the subject under consideration. Thirdly, he submitted that the *MacMillan* and *Greenwood* duties had already been applied in our jurisdiction and that any departure by us would be contrary to the common law of Malaysia that had already been established on the point.

We are of the view that there is merit in Mr. Sri Ram's argument. In our judgment, it is important generally speaking, and more so in matters of commercial law, that there should be uniformity in the common law of the Commonwealth. We are of the view that this is good judicial policy and provides for consistency. Accordingly, we are unable to accept Mr. Joginder Singh's arguments and in particular, his invitation for us to depart from *Tai Hing.*

We now turn to deal with the attack on the quantum awarded by the learned Judge. Mr. Joginder Singh submitted that it was wrong for the learned Judge to have awarded the interest that he did on the sums that had been wrongfully debited. We have studied the evidence led on the point and we are much impressed, as must have been the learned Judge, by the concession made by the appellant's witnesses that the appellant was obliged to reimburse the respondent with interest at the same rate as that imposed on the respondent's overdraft account. The learned Judge, strictly speaking, was not making any special award in the nature of damages when he awarded interest and there was therefore no question of double accounting. In our view, this was merely a case of an adjustment of the accounts and when we so put it to Mr. Joginder Singh, he had perforce to concede that this was so. Accordingly, we find no merit in the complaints made in respect of quantum and would therefore uphold the learned Judge's decision on this.

In the circumstances, the appeal was dismissed with costs. The respondent will have the deposit in Court paid out to it to account of its taxed